

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CHRISTOPHER A. WODJA, DDS,)	NO. 63318-0-I
)	
Appellant,)	DIVISION ONE
)	
v.)	
)	
WASHINGTON STATE DEPARTMENT)	UNPUBLISHED OPINION
OF HEALTH, DENTAL, QUALITY)	
ASSURANCE COMMISSION,)	
)	
Respondent.)	FILED: February 8, 2010
)	

Lau, J. — The Department of Health's Dental Quality Assurance Commission sanctioned Dr. Christopher Wodja, D.D.S., for unprofessional conduct under the Uniform Disciplinary Act. On appeal, he contends the hearing panel was biased, violating his right to due process and the appearance of fairness. But we presume the panel members properly performed their duties absent specific evidence to the contrary. Because there is no evidence of bias here and Dr. Wodja's other arguments are unpersuasive, we affirm.

FACTS

Dr. Christopher Wodja received his Washington dentistry license in 2002. In 2006, he became the principal owner of North City Dental Clinic, where he provided a variety of dental services—including fillings, crowns, bridges, periodontal work, and root canals. On October 16, 2007, he saw Patient A and diagnosed her with severe tooth decay, an infection, and a mouth abscess.¹ He recommended she make another appointment where he would perform an “incision and drain” procedure for the abscess. He also prescribed Acetaminophen with Codeine and six 0.25 milligram tablets of a sedative called “triazolam.” The prescription instructions directed her to take two of the triazolam tablets one hour before the procedure.

The soonest Patient A was able to see Dr. Wodja was after normal business hours, approximately 7 p.m. the next day. By that point, all of the clinic’s staff had left. Patient A’s roommate, Janeel Adams, drove her to the parking lot at Dr. Wodja’s clinic. Adams later testified that Patient A seemed “loopy, and giddy.” Administrative Record (AR) at 1401. Adams said she left to pick up a friend, but Dr. Wodja called her cell phone about 45 minutes later, requesting her to bring the four remaining triazolam tablets to the clinic. Adams testified that when she and her friend went inside to give Dr. Wodja the tablets, they saw Patient A come around a corner wearing nothing but a see-through gown and a tank top. They heard her ask Dr. Wodja if she could put her

¹ Patient A’s dental problems stemmed from her history of methamphetamine addiction. Dr. Wodja later testified he was not aware of this history until he saw her the following day.

pants back on. She seemed giddy and groggy.

The two briefly left the clinic and consulted with Adams's sister by phone. Based on the sister's advice, they returned to the office and asked to see Patient A. She was in an operating chair with a blanket draped over her and a mask on her face.

According to Adams's friend, Patient A "could barely open her eyes and barely move . . . she was very sedated and out of it and incoherent and mumbling, confused." AR at 1381. Soon after this, they helped Patient A dress, escorted her out of the clinic, and called the police. The police took her to Harborview Medical Center, where she was evaluated for possible sexual assault, a swollen right cheek, and confused consciousness associated with sedation. Patient A later filed a complaint against Dr. Wodja with the Department of Health's Dental Quality Assurance Commission.

On October 26, 2007, Department of Health investigator Gary Reed visited Dr. Wodja's clinic. According to Reed, Dr. Wodja explained that he gave Patient A the gown because she wore tight jeans to the appointment instead of loose fitting clothing. And he did not ask her to put her clothes back on because he thought the procedure would only take a few minutes.² Dr. Wodja acknowledged administering two additional tablets of triazolam to Patient A from the vial that Adams retrieved. In addition, he informed Reed that he gave her part of two crushed 0.125 milligram tablets of triazolam from his supply of drug samples. When asked whether he had charted the use of these

² Dr. Wodja later claimed he was unaware that Patient A was naked from the waist down until she left the chair in his office at approximately 8:45 p.m. because she was covered with a blanket. But the panel of Commission members adjudicating his case did not find this claim to be credible.

samples, Dr. Wodja responded, "No. Was I supposed to?" AR at 1484.

Reed located Patient A's chart in a closet on top of a jumbled pile of documents away from Dr. Wodja's other files. Dr. Wodja had failed to chart the additional doses of triazolam, Patient A's vital signs during the time she was under conscious sedation, his administration of a local anesthetic, the incision or drainage site, the instruments he used during the procedure, and whether or not he used sutures. Reed later sent Dr. Wodja requests for additional information, but Dr. Wodja did not respond, citing a pending criminal investigation.³

On November 26, 2007, the Department of Health filed a statement of charges against Dr. Wodja accusing him of unprofessional conduct. In addition to the events described above, the statement of charges included a paragraph referring to Dr. Wodja's 1999 conviction for misdemeanor assault.

Respondent [Dr. Wodja] has a history of assaultive behavior toward young women. On August 19, 1999, he pleaded guilty to assault and battery (misdemeanor) of a sixteen-year-old female in Boston, Suffolk County, Massachusetts. He served time in jail for that criminal offense and was placed on probation. The probationary requirements were transferred to Washington when he changed his residence in 2000.

AR at 14. On November 30, the Commission issued an ex parte order of summary suspension based on its determination that Dr. Wodja was an immediate danger to the public.

Dr. Wodja requested an expedited hearing before the Commission. Prior to the

³ Reed testified that to his knowledge, no criminal charges were ever filed.

hearing, he moved to redact the paragraph referencing his prior conviction. The presiding officer granted the motion but ruled that the conviction could be used in considering appropriate sanctions. Dr. Wodja then moved to exclude any Commission members involved in the summary suspension on the theory that they had knowledge of the 1999 conviction and were therefore biased. The presiding officer denied the motion but agreed to give the limiting instruction Dr. Wodja requested—“[N]one of the evidence that you became aware of in [the summary suspension] proceeding has any effect on this proceeding today. You're only to consider evidence that is submitted evidence at this hearing today in reaching a determination.” AR at 1363–64.

During the hearing, the Department of Health's expert, Dr. Bart Johnson, testified that the manufacturer's recommended maximum dose for triazolam is 0.5 milligrams but that he generally only uses 0.125, 0.25, or 0.375 milligrams, depending on the size of the patient. He emphasized that a justification should be documented if a provider administers more than the published recommendation for triazolam. He then concluded that Dr. Wodja failed to record a justification even though he used more than twice the manufacturer's recommended maximum. Dr. Johnson also testified that a dentist using triazolam in a clinical setting should have knowledgeable staff present to assist in an emergency. He concluded that Wodja's conduct was “egregious” and the risk of harm to Patient A was substantial.

Dr. Wodja's expert, Dr. Deeann Isackson, testified that triazolam is “a very safe drug” and up to 2 milligrams of triazolam can be safely administered. AR at 1590. She also noted that triazolam may cause sexual fantasies and suggested that Patient A may have had a sexual fantasy. Dr. Wodja

also presented testimony from Dr. Brian Judd, a sexual deviancy evaluator. Dr. Judd testified that based on his evaluation, there was no indication that Dr. Wodja touched Patient A in a sexual manner. However, Dr. Judd also conceded his evaluation was incomplete.

After the hearing, the Commission concluded that Dr. Wodja engaged in unprofessional conduct under the Uniform Disciplinary Act, chapter 18.130 RCW, and that sanctions were warranted. It then identified several aggravating factors, including the 1999 conviction. The Commission's final order suspended Dr. Wodja's dental license for seven years, but allowed him to petition for reinstatement or modification of the order after five years, conditioned on his completing various education requirements and "psychological/sexual misconduct" counseling. AR at 1202-03. He appealed to the King County Superior Court, which affirmed the Commission's decision.

Dr. Wodja appeals.

Standard of Review

The Uniform Disciplinary Act (UDA), chapter 18.30 RCW, provides for licensing and disciplinary procedures for health professionals. Its intent is "to assure the public of the adequacy of professional competence and conduct in the healing arts." RCW 18.130.010. Under the UDA, unprofessional conduct includes acts involving moral turpitude, incompetence or malpractice, misuse of controlled substances, violation of administrative rules, failure to cooperate with the Commission, and abusing clients. RCW 18.130.180(1), (4), (6), (7), (8), (24). The standard of proof is clear and convincing evidence. Nguyen v. Dep't of

Health, Med. Quality Assurance Comm'n,

144 Wn.2d 516, 518, 29 P.3d 689 (2001).

Judicial review of disciplinary proceedings under the UDA is governed by the Washington Administrative Procedure Act (WAPA), chapter 34.05 RCW. Under the WAPA, a reviewing court may reverse an administrative order (1) if it violates the constitution, (2) if it is based on an error of law, (3) if it is unsupported by substantial evidence, or (4) if it is arbitrary or capricious. RCW 34.05.570(3)(a), (d), (e), (i). The party challenging agency action has the burden of demonstrating the action is invalid and must show substantial prejudice. RCW 34.05.570(1)(a), (d). Issues of law are reviewed de novo; however, this court accords substantial weight to the agency's interpretation of a law it administers. Ames v. Dep't of Health Med. Quality Assurance Comm'n, 166 Wn.2d 255, 260–61, 208 P.3d 549 (2009). Findings of fact are reviewed for substantial evidence, which is evidence “of sufficient quantity to persuade a fair-minded person of the truth or correctness of the agency order.” Hahn v. Dep't of Ret. Sys., 137 Wn. App. 933, 939, 155 P.3d 177 (2007). The reviewing court defers to the trier of fact on issues of credibility and conflicting evidence. Callecod v. Washington State Patrol, 84 Wn. App. 663, 676 n.9, 929 P.2d 510 (1997). And medical review boards are able to rely on their own experience and specialized knowledge in determining whether a medical practitioner engaged in unprofessional conduct. In re Disciplinary Proceeding Against Brown, 94 Wn. App. 7, 13–14, 972 P.2d 101 (1999).

ANALYSIS

Due Process and the Appearance of Fairness

A medical professional's license

represents a property interest and cannot be revoked without due process.

Washington Med. Disciplinary Bd. v. Johnston, 99 Wn.2d 466, 474, 663 P.2d 457 (1983). A basic requirement of due process is a “fair trial in a fair tribunal.” Withrow v. Larkin, 421 U.S. 35, 46, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975) (quoting In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955)). A biased decisionmaker violates this basic requirement, which applies to administrative agencies as well as courts. Withrow, 421 U.S. at 47. The appearance of fairness doctrine “provides additional protection because it requires that the agency not only act fairly but must also do so with the appearance of fairness.” Clausing v. State, 90 Wn. App. 863, 874, 955 P.2d 394 (1998). “Under the appearance of fairness doctrine, proceedings before a quasi-judicial tribunal are valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing.” Johnston, 99 Wn.2d at 478. But the presumption is that administrative decisionmakers perform their duties properly and the party claiming a violation must present specific evidence to the contrary, not speculation. Faghih v. Dep’t of Health, Dental Quality Assurance Comm’n, 148 Wn. App. 836, 843, 202 P.3d 962 (2009).

Dr. Wodja argues the Commission violated his right to due process and the appearance of fairness based on prejudgment bias. He notes that three of the Commission members who voted to summarily suspend his license were also on the hearing panel that issued the final suspension order. Further, he claims they should have been disqualified because they knew about his prior misdemeanor conviction, which the presiding officer ruled

inadmissible. But these facts fail to establish prejudgment bias or an appearance of fairness violation.

It is not improper for the same Commission members to serve on both summary suspension and hearing panels. In Clausing, a physician challenged his license revocation by arguing it was improper for the medical board to rule on both the summary restriction and final orders. Clausing, 90 Wn. App. at 876. The court rejected this argument, analogizing the summary suspension to a probable cause determination, which does not require the decisionmaker to be disqualified from subsequent consideration of the case's merits. Clausing, 90 Wn. App. at 875–76. The court concluded no due process or appearance of fairness violation occurred from “the mere fact that the same Board panel decided Dr. Clausing’s summary restriction and final order revoking his license.” Clausing, 90 Wn. App. at 876.

Similarly, in Johnston, the suspended doctor argued prejudgment bias occurred because the same individual served on both panels and commented during the revocation hearing about the summary suspension. “[W]e don’t use a summary suspension very often, but when we do, we feel that there is a real grave danger to the public and that’s why we did it in this case.” Johnston, 99 Wn.2d at 475. The court held that the comments were merely an elaboration on why Johnston’s license had to be suspended summarily and that “a general predilection toward a given result” did not deprive him of due process where there was no showing that it prevented the panel from deciding his case fairly in the revocation hearing. Johnston, 99 Wn.2d at 475–76.

Here, Dr. Wodja fails to demonstrate why the participation of the summary suspension panel members in his

disciplinary hearing violated due process or the appearance of fairness doctrine. He speculates that the panel's impartiality was "corrupted by consideration of inadmissible evidence." Appellant's Br. at 27. But there is no evidence to suggest the panel considered his 1999 conviction when finding his conduct unprofessional. The original statement of charges focused almost exclusively on Dr. Wodja's conduct towards Patient A, and the order of summary suspension did not rely on or even mention the prior conviction. Additionally, the presiding officer gave the panel a limiting instruction directing them to consider only evidence admitted at the hearing, which did not include the 1999 conviction. The presumption is that the panel performed its duties properly absent specific contrary evidence, which must consist of more than speculation.⁴

Faghih, 148 Wn. App. at 843.

Dr. Wodja claims the presumption is overcome because the limiting instruction was insufficient in light of the "extraordinarily prejudicial" nature of the prior conviction. Appellant's Reply Br. at 6. He argues that Commission panel members are like jurors and analogizes to State v. Johnson, 90 Wn. App. 54, 950 P.2d 981 (1998), where the court held it was unfairly prejudicial to admit the defendant's prior rape conviction

⁴ Dr. Wodja asserts that the panel "necessarily" considered the 1999 conviction because it did not find that he sexually abused Patient A, yet it "inexplicably" ordered him to engage in sexual misconduct counseling. Appellant's Br. at 20. But he points to nothing in the record to indicate it was ever suggested to the panel that the facts underlying the 1999 misdemeanor conviction were sexual in nature, so it is not clear how this sanction shows that the panel "necessarily" considered the conviction. Moreover, although the panel did not find that he sexually abused Patient A, it did find that he caused Patient A to be unclothed in his office for a prolonged period with no other staff present in a state of heavy sedation. The counseling requirement appears to be based on consideration of these factual circumstances, not the 1999 conviction.

because “there was a significant risk that the jury would declare guilt on the two assault charges based upon an emotional response to the rape conviction rather than make a rational decision based upon the evidence.” Johnson, 90 Wn. App. at 63. But the proceeding here is not analogous to a criminal trial with its traditional distinctions between the role of the judge and the jury. Here, the hearing panel’s role was to evaluate the evidence and make the final determination on whether the facts amounted to unprofessional conduct in violation of the UDA. RCW 18.130.050(10). It set out its final decision in an order consisting of findings of fact, conclusions of law, and sanctions. In short, the panel functioned “not only as a trier of fact but also as the ultimate decision-maker, not unlike a judge in a bench trial.” Faghih, 148 Wn. App. at 845. And the judge in a bench trial is presumed to consider only evidence properly before the court regardless of any exposure to inadmissible evidence. State v. Read, 147 Wn.2d 238, 245, 53 P.3d 26 (2002).

Finally, under the circumstances here, the prior conviction did not cause the panel to make an emotional decision rather than a rational decision based on the evidence. The misdemeanor conviction occurred almost 10 years before the incident with Patient A. And because the underlying facts were not disclosed to the panel, it did not know whether the misdemeanor involved sexual misconduct, the misuse of prescription drugs, or professional malpractice. In contrast, the evidence properly before the panel included testimony that Dr. Wodja administered more than twice the recommended maximum dose of triazolam, Patient A was discovered alone with Dr. Wodja naked from the waist down, and he failed to chart critical aspects of her treatment. In this context, Dr. Wodja fails

to show that the panel's adverse decision was due to improper consideration of his prior conviction as opposed to the evidence admitted during the hearing.

Dr. Wodja fails to establish a violation of due process or the appearance of fairness doctrine.⁵

Other Contentions

Dr. Wodja raises several additional arguments, but they are not persuasive. First, he contends the presiding officer erred by not submitting his sanctions brief to the panel because this prevented him from presenting mitigating evidence regarding his prior conviction. Under the WAPA, evidentiary rulings are within an agency's discretion and appellate review is limited to ensuring the agency exercised its discretion lawfully. Clausing, 90 Wn. App at 878. Dr. Wodja argues that a professional license revocation

⁵ Dr. Wodja relies on several cases from other jurisdictions, but each is distinguishable. In Diamond v. Board of Fire & Police Commissioners, 115 Ill. App. 3d 437, 438, 450 N.E.2d 879 (1983), a disciplinary board affirmed a police officer's discharge. The board was aware of the officer's polygraph test results that suggested deception on key questions, despite the test's inadmissibility. The court reversed because the board was not specifically admonished to disregard the test results. Here, in contrast, the presiding officer specifically instructed the panel to consider only the evidence admitted at the hearing.

In Reid v. New Mexico Board of Examiners of Optometry, 92 N.M. 414, 589 P.2d 198 (1979), the court held that the board violated Reid's due process rights by failing to disqualify a board member who stated prior to the hearing that Reid would "be losing his license soon." Reid, 589 P.2d at 199. Here, there is no comparable evidence of prejudgment bias.

In Devous v. Wyoming State Board of Medical Examiners, 845 P.2d 408, (Wyo. 1993), the court found that one of the physicians exhibited "clear and compelling bias" against Dr. Devous. Devous, 845 P.2d at 418. It noted that he knew Dr. Devous in the early 1980s and he appeared before the board at that time to express unfavorable opinions about Dr. Devous. Devous, 845 P.2d at 418. There is no such evidence about the panel members at Dr. Wodja's hearing.

hearing is a quasi-criminal proceeding, so he had a right to present his sanctions brief just as criminal defendants have a right of allocution prior to sentencing. But he cites no cases holding that there is such a right in this context.⁶ We conclude that the presiding officer exercised his discretion lawfully. In any event, the portion of Dr. Wodja's sanctions brief discussing the prior conviction did not present any significant mitigating evidence. Instead, it consisted of a brief paragraph arguing that the conviction was insignificant because it was only a misdemeanor and occurred many years earlier. As the panel was made aware of this information, any error was not prejudicial.

Dr. Wodja also argues that his failure to cooperate with the Commission by providing a written statement should be excused based on the Fifth Amendment. He notes that under the Fifth Amendment no person "shall be compelled in any criminal case to be a witness against himself" U.S. Const. amend. V. And relying on King v. Olympic Pipeline Co., 104 Wn. App. 338, 353, 16 P.3d 45 (2000), he contends that he was not required to provide a statement because there was a pending criminal matter, which implicated his Fifth Amendment right to silence. But in King, the issue was whether the court improperly denied a request to stay civil proceedings based on

⁶ Dr. Wodja relies on Board of Dental Examiners v. King, 364 So.2d 319, 321 (Ala. Civ. App. 1978), but the holding there was based on the board's consideration of a file on prior misconduct that was not introduced into evidence. And the issue in Veksler v. Board of Registration in Dentistry, 429 Mass. 650, 711 N.E.2d 562, 563 (1999) was that the board failed to provide Dr. Veksler with any hearing, in violation of a state statutory scheme. The court did not hold there is a right of allocution under the due process clause before a medical provider's license can be revoked. Veksler, 711 N.E.2d at 564.

parallel criminal proceedings. Here, Dr. Wodja never requested a stay of the Commission's proceedings. In any event, Dr. Wodja's argument misperceives the function of the Fifth Amendment privilege, which is to protect a person from compulsory disclosure of criminal, not civil, liability. Thus, while a person may choose to assert the privilege in a civil proceeding in order to avoid negative consequences in a criminal proceeding, the Fifth Amendment does not bar the trier of fact in the civil proceeding from drawing an adverse inference from the person's silence. Ikeda v. Curtis, 43 Wn.2d 449, 457–58, 261 P.2d 684 (1953). Dr. Wodja's Fifth Amendment argument is without merit.

Dr. Wodja also claims the Commission's order is not supported by substantial evidence. In particular, he objects to the Commission's findings regarding his use of triazolam. For example, he claims that the evidence presented at the hearing does not support the Commission's finding that the maximum recommended dose is 0.5 milligrams. He notes that Dr. Isackson testified that the maximum safe dosage for triazolam is 2 milligrams and that Dr. Johnson conceded, "[I]t's going to be an ongoing investigation for probably several more years before we really have perfect guidelines." Appellant's Br. at 36–37. But Dr. Johnson also testified that the manufacturer's maximum recommended dosage is 0.5 milligrams. This evidence is sufficient to support the Commission's finding. And we defer to the Commission's resolution of conflicting evidence. Dr. Wodja also complains that the finding that he inappropriately prescribed six 0.25 milligram tablets of triazolam is unsupported because Dr. Johnson testified that the prescription was within an acceptable range. But Dr. Johnson's approval was conditioned on the tablets

being used for multiple procedures. And the Commission specifically found Dr. Wodja's claim that he prescribed six tablets because he expected to perform future work on Patient A lacked credibility. We do not review credibility determinations. Dr. Wodja's other objections also amount to a reiteration of his theory of the case based on his version of the facts. We decline his invitation to reweigh the evidence.⁷

Finally, Dr. Wodja challenges the Commission's sanctions against him. The UDA allows the Commission to impose sanctions if it determines a dentist has engaged in unprofessional conduct, including license suspension, completion of remedial education or treatment, and restrictions on the dentist's practice. RCW 18.130.160. Its "paramount responsibility" is to safeguard the public's health and safety. RCW 18.130.160. And this court defers to the Commission's determination of appropriate

⁷ Dr. Wodja does point to two findings that are not supported by the evidence, but he fails to show any likelihood that they prejudiced him. The Commission found that

Dr. Wodja prescribed clindamycin and Vicodin, in addition to the triazolam and acetaminophen with codeine. These findings are not supported by substantial evidence as the record demonstrates that another medical provider was responsible for these prescriptions. However, these findings (and the finding that he failed to chart the prescriptions) were only one of nine bases for the Commission's determination that Dr. Wodja failed to properly maintain patient records. Accordingly, there is no prejudice.

The Commission also found that Dr. Wodja violated the standard of care "when he released Patient A without providing written post-operative instructions while she was obviously in a state of heavy sedation prior to leaving his office, causing her harm or placing her at risk of harm from oversedation." AR at 1190. The finding that Dr. Wodja failed to provide written postoperative instructions does not appear to be supported by the record. For example, Adams testified, "He had prepared instructions in his hand; and he started to explain them. I just took them out of his hand and told him we were leaving." AR at 1417. However, there was ample testimony from which the panel could find that Dr. Wodja placed her at risk from oversedation. Thus, Dr. Wodja fails to show any prejudice from this finding.

sanctions, only reversing sanctions that are arbitrary or capricious. Brown, 94 Wn. App. at 16. The Commission's action is not arbitrary or capricious unless it is "willful and unreasoning action made without consideration and without regard to the facts and circumstances." Lang v. Dental Quality Assurance Comm'n, 138 Wn. App. 235, 255, 156 P.3d 919 (2007).

Here, the only specific sanction Dr. Wodja objects to is the condition that he obtain "psychological/sexual misconduct counseling" before seeking a modification of the Commission's order. AR at 1203. He argues that the sanction is unwarranted because the Commission did not find he sexually abused Patient A. He relies on Aponte v. Dep't of Social & Health Servs., 92 Wn. App. 604, 620, 965 P.2d 626 (1998). But the issue in that case was whether the evidence was sufficient to make a sexual deviancy evaluation "necessary" under an administrative regulation regarding revocation of foster care licenses. Aponte, 92 Wn. App. at 621. The court concluded, "[T]he evidence of sexual grooming is so minimal and ambiguous that it cannot justify the conclusion a sexual deviancy evaluation was absolutely required." Aponte, 92 Wn. App. at 621. In contrast, the issue here is whether the Commission acted "without regard to the facts and circumstances" in imposing the counseling sanction on Dr. Wodja. While the Commission did not find that he sexually abused Patient A, it did find that he caused her to be unclothed in his office after hours in a state of heavy sedation for a prolonged period with no other staff present. Under these circumstances, the Commission's sanction is not arbitrary or capricious.

We affirm.

Jan, J.

WE CONCUR:

Becker, J.

Grosse, J